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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 SERGEY LEONTIEV,

4 Plaintiff,

New York, N.Y.

5 v.

16 CIV. 3595 (JSR)

6 ALEXANDER VARSHAVSKY,

7 Defendant.

8 -----x

9 September 21, 2016  
4:10 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge Judge

13  
14 APPEARANCES

15  
16 GIBSON, DUNN & CRUTCHER, LLP  
Attorneys for Plaintiff

17 BY: MARSHALL R. KING  
ROBERT L. WEIGEL  
18 ESTER MUKDUKHAYEVA

19 DEBEVOISE & PLIMPTON, LLP  
Attorneys for Defendant  
20 BY: SEAN HECKERWILLIAM H. TAFT

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(In open court)

MR. WEIGEL: Robert Weigel, Marshall King, and Esther, Murdukhayeva for the plaintiff.

THE COURT: Good afternoon.

MR. WEIGEL: Good afternoon, your Honor.

MR. HECKER: Good afternoon, your Honor. Sean Hecker and William Taft for the defendant Mr. Varshavsky.

THE COURT: Good afternoon.

We have several matters to take up and because of other commitments we need to do so quite expeditiously. The first is the plaintiff's motion for judgment on the pleadings. I have allotted each side for argument on that motion 15 minutes, plaintiff has reserved five from its 15 for rebuttal.

Let me hear from plaintiff's counsel first.

MR. WEIGEL: Thank you, your Honor.

This is a declaratory judgment action which, as your Honor knows, really does nothing to change who has the burden of proof. It is merely a procedural device and, as Judge Kaplan said, nothing concerning the pleading, the proof and the trial of the action changes because of a declaratory judgment action.

THE COURT: What case, if any, adopts your view that in a declaratory judgment proceeding the defendant is held to the standards of *Iqbal* and *Twombly*?

MR. WEIGEL: Your Honor, there are no cases that we

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1 have found that specifically deal with that issue but there are  
2 cases and the FE case we cite is where case where much of the  
3 judgment and pleadings was decided in favor of the plaintiff  
4 after Judge Griesa reviewed the things that the Second Circuit  
5 has said you can review, namely the pleadings, the documents  
6 attached to the pleadings, the admissions and any sort of  
7 publicly available documents I think that are in support.

8 THE COURT: I think that sounds like a different issue  
9 to me.

10 I think that Judge Ramos really has it right when he  
11 addressed, in the case that is and is close to me on point as  
12 any I have seen which is Walton v. Hadley, 2014 WestLaw  
13 3585525, Southern District of New York 2014, which he held  
14 there was a title dispute brought on by declaratory judgment,  
15 it was a very common form of declaratory judgment, and he held  
16 that to adopt your view would be to allow one party to bring a  
17 declaratory judgment before the matter was fully investigated  
18 and then obtain a favorable declaration of ownership based  
19 solely on the counterparties' in fact to adequately state an  
20 affirmative claim in its favor.

21 It is one thing for a party in an answer and  
22 declaratory judgment to raise a material dispute which has  
23 clearly happened here that will have to be resolved by summary  
24 judgment or trial. It is quite another thing to say you now  
25 have to turn around, even though you have just been hauled into

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1 court by the plaintiff, and be able to set forth with the  
2 specificity demanded by *Twombly* a full-fledged claim against  
3 plaintiff. That sounds to me like an invitation to a form of  
4 ambush.

5 So, that prong of your motion is denied.

6 MR. WEIGEL: May I address that for just a second,  
7 your Honor?

8 THE COURT: Of course. You can use your 15 minutes  
9 all you want. If you want to use it on something where my mind  
10 is made up, that's fine. Please, do.

11 MR. WEIGEL: I'm not sure I understand what prong of  
12 my motion you said was denied so if perhaps you can tell me  
13 that I might decide to use my time more wisely.

14 THE COURT: You also have raised whether the pleadings  
15 foreclose the possibility that Varshavsky has standing to  
16 collect the debts in his personal capacity. That, and whether  
17 the pleadings foreclose the possibility that Leontiev cannot be  
18 held personally liable, those are issues that arise from the  
19 respective pleadings that are not matters of *Iqbal* or *Twombly*.

20 MR. WEIGEL: Thank you, your Honor. I now understand  
21 your ruling.

22 I agree that Judge Ramos did not decide in that case  
23 that you can never have a motion for judgment on the pleadings  
24 if you are the plaintiff in the declaratory judgment action and  
25 Mr. Varshavsky, it is entirely within his own knowledge, he

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1 doesn't need any discovery to know who he represents and  
2 whether he has had any assignment of any claim.  
3 Mr. Varshavsky -- we said in paragraph 4 of our Complaint,  
4 Mr. Leontiev owes Mr. Varshavsky nothing, a simple statement.  
5 That is denied by Mr. Varshavsky yet nowhere in his answer or  
6 his amended answer does he allege any authority by which he has  
7 been assigned the claims and that's what the Second Circuit  
8 held in the Cortlandt Street case. It is not particularly, I  
9 think, contested -- in fact, I don't think they contest it at  
10 all in their papers -- that they have to be able to allege --  
11 Mr. Varshavsky has to allege that he has some proprietary  
12 interest in these claims.

13 The notes in question were given to a gentleman  
14 Mr. Renich, Mr. Avagumyan, Mr. Diana Karapetyan, and a company  
15 called Avalon. Mr. Varshavsky, nowhere in any of his pleadings  
16 says I have been assigned those claims, I own those claims, and  
17 I have a right to --

18 THE COURT: Just so we are clear, at what point or  
19 period are you requesting, among other things, a declaration  
20 that your client does not owe a debt to "anyone acting in  
21 concert or participation with Mr. Varshavsky?" Is that still  
22 what you're seeking or are you only seeking on this, what I am  
23 calling prong of your motion, a declaration that he doesn't owe  
24 anything personally to Mr. Varshavsky?

25 MR. WEIGEL: We are seeking a declaration that the

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1 individual before the Court, Mr. Varshavsky, is not owed  
2 anything by Mr. Leontiev. Your Honor could decide this on  
3 several different grounds and some of those grounds might be  
4 applicable to other parties, as the Supreme Court said, justice  
5 Ginsburg said --

6 THE COURT: I'm not really understanding.

7 Are you asking for a -- I will put it to you again.  
8 Are you asking for a declaration which you, at one point in  
9 your papers indicated you were, that your client -- I'm  
10 sorry -- that your client does not owe a debt to "anyone acting  
11 in concert or participation with Mr. Varshavsky."

12 MR. WEIGEL: Right now, your Honor, we are asking just  
13 for the first part of that, that we are asking for a  
14 declaration that Mr. Leontiev owes nothing to Mr. Varshavsky  
15 personally.

16 THE COURT: Okay. That's what I wanted to know.

17 So, that, I think, is an open question. I haven't  
18 made up my mind on that. Since I know you are short on time,  
19 did you want to say anything about this ego veil-piercing issue  
20 under Cypriot law?

21 MR. WEIGEL: Yes, I did, your Honor.

22 As the declaration of the expert shows, and I think it  
23 is quite clear from the other sources as well, that Cypriot law  
24 follows English law. It is an English colony and it adopted  
25 English law.

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Judge Cote did a very thorough --

THE COURT: You take your life in your hands if you want to call them an English colony, but I understand what you mean.

MR. WEIGEL: I think until the '60s they had some place in the commonwealth. I wouldn't --

THE COURT: Anyway, go ahead.

MR. WEIGEL: Judge Cote did a very extensive analysis of English law and although, as we all know, veil piercing is very uncommon and strictly construed in the United States, it is even rarer in England. And what Judge Cote said and after analyzing it very clearly is that the distinction in England is between somebody interposing a corporation between themselves and a liability that they already have. And the examples that were cited were an individual who had a non-compete with his employer who sets up a company to compete with his employer and the Court said, no, you can't do that, you can't do that, we will pierce that veil. But here --

THE COURT: You have one more minute.

MR. WEIGEL: Here you have a company call Ambika, it was created in 2006, it lent money to a company called -- borrowed money from a company called Avalon in 2008. There is no assertion it didn't perform on that loan and pay interest or whatever for that whole period of time. There is no assertion that Mr. Leontiev was -- undertook a personal obligation to pay

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1 that money back when it was borrowed. The documents don't  
2 suggest it, they've offered no fact from 2008 that would in any  
3 way suggest that Mr. Leontiev was liable. Under English law we  
4 are talking -- it is perfectly acceptable to set up a  
5 corporation to insulate yourself from future liabilities and  
6 they are -- it is very rare and I think the analysis that Judge  
7 Cote set forth, it's quite clear that they have not come close  
8 to meeting what is necessary to allege to pierce a veil under  
9 English law and therefore under Cypress law.

10 THE COURT: Thank you very much. Let me hear from  
11 defense counsel.

12 MR. HECKER: Well, first, I just want the record to be  
13 clear that what happened today is the first time that they've  
14 made clear that their summary judgment motion is directed only  
15 toward trying to get a judgment on something that is  
16 undisputed. It is not even alleged that our client attempted  
17 to collect, in his personal capacity, on the loan. He is the  
18 president of Avalon which they've acknowledged is the  
19 noteholder.

20 THE COURT: So, I don't see why you feel put upon by  
21 the fact that they've now made a concession favorable to you.  
22 Do you want them to withdraw their concession?

23 MR. HECKER: I don't, your Honor, but we have spilled  
24 a lot of ink on this issue.

25 THE COURT: Oh, life is very tough.



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1           So, here is the state of play. Number one, *Iqbal* and  
2           *Twombly* do not apply to the answer.

3           Two, they are not seeking at this point any  
4           declaration that the plaintiff is liable to the defendant  
5           Varshavsky in plaintiff's personal capacity, right? Do I have  
6           that right? I always get these Russian names backwards but I  
7           think that's right. Everything else is fair game so why don't  
8           you talk about the things that are still fair game.

9           MR. HECKER: Okay.

10           I think we agree that Judge Cote covered the English  
11           law and ultimately the Cypress law issue comprehensively, but I  
12           don't think the take away is as cabined a view of veil piercing  
13           under Cypriot law as plaintiff advanced and this is really  
14           important. It is largely a matter of applying the principle  
15           that no one should be allowed to profit from his own fraud by  
16           using entities he controls, and the temporal issue about when  
17           the debt existed or didn't exist isn't the Court issue. It may  
18           be that in some cases it has been a situation where someone has  
19           created the company and interposed the company after the debt  
20           exists but this is a situation where if we looked at our  
21           amended complaint, we certainly agree with the Court's ruling  
22           that *Iqbal* and *Twombly* don't apply with an affirmative defense  
23           in this context, but if you look at the allegations we now made  
24           in our amended complaint, we are alleging that this is a  
25           fraudulent scheme from the outset and the fact that the

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1 plaintiff had the foresight to create the series of shell  
2 companies in order to ensure that he could siphon off funds  
3 from the shells using nominees that he put in place. He  
4 doesn't get out from under veil piercing because he interposed  
5 some of these companies at the beginning of the scheme.

6 This is an allegation of a systematic fraud through a  
7 series of entities that plaintiff controls and to this day  
8 controls, where he siphoned off funds, made the borrowing  
9 entities insolvent, and has access and control of the funds  
10 now. And the notion that because he set this scheme up from  
11 the beginning gets you out of veil piercing under Cypress law,  
12 that is not what the law says. And I would have the Court look  
13 not just at Judge Cote's decision but at the decision that  
14 plaintiff's expert relies on *Apostolou v. Ioannou* which is  
15 attached as Exhibit C to the report of Mr. Havarias. What that  
16 case says is the usual case for veil piercing and not the only  
17 case but the usual case is where the company is used by the  
18 person controlling the company simply as an artificial medium,  
19 a shield to avoid pre-existing obligations.

20 In that case and in Judge Cote's case they both cite  
21 the *Trustor v. Smallbone* case, that's in Judge Cote's decision,  
22 that's 43 Bankruptcy Reporter at 87, and it is cited in the  
23 *Apostolou* case as well. And there the Court pieced the veil  
24 where a corporate officer misappropriated money from a  
25 corporation by transferring into a shell company that he

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1 controlled and then used the shell company's money for his own  
2 benefit, and the Court there held that the individual could be  
3 held liable for the debts of the shell company though the facts  
4 made clear didn't have the pre-existing debt when he  
5 transferred the money.

6 So, this thing about the timing driving everything is  
7 just wrong. Just wrong. The law in England and in Cypress is  
8 not that narrowly cabined and what we have alleged here is a  
9 full-fledged fraud and the judgment they're seeking ultimately,  
10 although now it is just against our client or at least on this  
11 motion just against our client, would preclude bringing the  
12 case in any court on a veil piercing theory or a fraud theory,  
13 a straight fraud theory. But what we have alleged is more than  
14 sufficient to establish fraud by Mr. Leontiev even if he didn't  
15 veil pierce. It is a scheme to defraud.

16 So, I think the notion of foreclosing veil piercing  
17 before we have an opportunity to have any discovery on the  
18 facts around his concoction of this scheme seems premature. I  
19 don't think that the law is clear enough to be able to  
20 foreclose discovery on those issues.

21 THE COURT: All right.

22 Let me hear rebuttal from plaintiff's counsel.

23 MR. WEIGEL: Well, your Honor, we are gratified that  
24 it is undisputed that they do not contend that Mr. Varshavsky  
25 is owed anything by Mr. Leontiev. That was not the case in

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1 their answer or in their amended answer which denied paragraph  
2 4 of the complaint which says Mr. Leontiev owes Mr. Varshavsky  
3 nothing.

4 We did say in our reply papers: To avoid any  
5 ambiguity, Mr. Leontiev is only asking this Court to adjudicate  
6 the dispute between the parties before the Court and if there  
7 was any ambiguity in that I apologize but I was trying to make  
8 clear there that we were just claiming against Mr. Varshavsky  
9 here.

10 In terms of their interpretation of English law, I  
11 would just direct the Court to the In Re: Tyson case that Judge  
12 Cote decided where she makes it quite plain that commentators  
13 also regard the distinction between existing legal duty and  
14 potential future liability as fundamental to understanding  
15 English veil-piercing law. The High Court stated the corporate  
16 structure could legitimately be used to limit the legal  
17 liability in respect of particular future activities while  
18 transactions of no legal substance and which are set up with a  
19 view to defeating existing claims of creditors can if they are  
20 purely a sham and a facade be treated by the Court as lacking  
21 validity.

22 So, the distinction is between existing claims, the  
23 Smallbone case is a perfectly fine example. Somebody took  
24 money out of a company they weren't supposed to and they  
25 transferred it to a company called Smallbone and in that case

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1 the Court said the veil of Smallbone could be pierced.

2 Here that was always with, in terms of Avalon anyway,  
3 with Ambika. They knew who they were contracting with. As  
4 Judge Cote said, one of the reasons for this harsh rule in  
5 English law is that you can contract around it. And they did.  
6 They got themselves a bank guarantee -- not Mr. Varshavsky but  
7 Avalon got itself a bank guarantee for the loans in advance to  
8 Ambika and that's in the document.

9 They have a way to contract around it. They're  
10 unhappy now I guess because they were getting 14 percent  
11 interest and they were taking a risk and the bank failed. We  
12 don't know how much Avalon is going to recover from that but  
13 they don't have a claim for veil piercing under English law.  
14 This was a company that was created in 2006 and existed for 10  
15 years up to this point and it was not a sham, it existed, they  
16 have not -- it was not interposed between any liability of  
17 Mr. Leontiev which they've never alleged, and Avalon.  
18 Mr. Leontiev didn't borrow money from Avalon, they don't allege  
19 he did. It wasn't his obligation, it was Ambika's obligation.  
20 And what English law says is you can set up a corporation to do  
21 that and therefore I would submit that since we all agree Judge  
22 Cote's analysis is right, if one looks at that, I believe that  
23 there is no possibility that they can prove up that the veil of  
24 Ambika should be pierced.

25 Thank you, your Honor.

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1 THE COURT: Thank you very much. I will give defense  
2 counsel, since you took very little of your time, if you wanted  
3 one or two minutes in surrebuttal, you can have it. You don't  
4 have to use it but if you want it, you can.

5 MR. HECKER: I would simply say this: If the Court  
6 reviews our amended answer and the allegations we have made,  
7 plaintiff has just made a series of assertions that are not  
8 admitted in the pleadings. We do not admit that Ambika was  
9 properly constituted to conduct only lawful business. We don't  
10 accept that the parties understood that Mr. Leontiev would use  
11 his control of Ambika to siphon off funds to other shell  
12 companies that he controlled. There are a number of entities  
13 whose veil could be pierced here and we haven't even had  
14 discovery yet so we don't accept the allegations. On this  
15 motion my understanding is that the facts have to be viewed in  
16 the light most favorable to us and on this issue we just don't  
17 think the factual records exists to find a finding of veil  
18 piercing and I think we need discovery to establish that.

19 THE COURT: I will reserve but I will get you a bottom  
20 line ruling on all aspects of this motion by no later than  
21 Friday of this week, to be followed by an opinion in due  
22 course.

23 Now, there were some discovery issues, let me just  
24 find my notes on that. First, plaintiff is refusing to produce  
25 certain categories of documents as irrelevant under plaintiff's

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1 understanding of Cypress veil-piercing law. These are  
2 documents relating to all "cloud entities beyond the name  
3 borrower's Ambika and Vennop." The second document is reading  
4 to Leontiev's ownership or control of cloud entities Wonder  
5 Works Investments, Ltd. and Wonder Heart Assets, Ltd, and  
6 transactions they had with other cloud entities. And third,  
7 documents necessary to show Leontiev's receipt/continued  
8 control of the borrowed funds.

9 Assuming that this is unaffected by any ruling I make  
10 on Friday but just on the present state of the record, it is  
11 not clear to me -- let me say I don't fully yet understand the  
12 document for not producing them assuming the matter goes  
13 forward.

14 MR. KING: Well, your Honor, Marshall King on behalf  
15 of plaintiff.

16 If you listen to Mr. Hecker's theory, Mr. Hecker's  
17 theory is -- today's theory, anyway, is that the borrowers were  
18 rendered insolvent by something that occurred after the money  
19 was lent. If they were rendered -- we are willing to produce  
20 documents about the transactions engaged in by the borrowers.  
21 To the extent that money was transferred to company B, it is  
22 the transfer to company B that's going to give rise to any  
23 argument for piercing the corporate veil if he is right about  
24 his theory and for the reasons Mr. Weigel said. We don't think  
25 he is right about that being a viable theory but if it is

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1 transferred to company B, that's the wrong. It doesn't matter  
2 whether company B transferred to company C, company D to  
3 company E to company F, to Mr. Leontiev, to some other company,  
4 to Wonder Works. He is taking discovery about all of this when  
5 the relevant issue is really right there at the beginning.  
6 This is about loans that were made to two Cypress companies and  
7 a Russian company. Period, full stop. So, if there is  
8 wrong-doing --

9 THE COURT: That same objection -- I am glad you  
10 reminded me, also -- there was an objection to a request for  
11 Leontiev's trading activities and, again, I think your position  
12 was you would produce it with respect to trading activities  
13 concerning the borrowed funds.

14 MR. KING: Absolutely.

15 THE COURT: But not otherwise.

16 MR. KING: Absolutely, your Honor. Yes, exactly. You  
17 have got it. It is just this is seeking all sorts of business  
18 activities, ownership interests, investments, transactions that  
19 don't concern the borrowers. This is about the borrowers.

20 THE COURT: Let me go to defense counsel.

21 Let's take the second part first. You asked for  
22 discovery of all of his trading activities? Isn't that  
23 overbroad on its face?

24 MR. HECKER: Your Honor, our concern is that the  
25 monies were siphoned out of these entities into this cloud that



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1 was set up precisely to obscure the flow of funds, and where  
2 those funds are now, our position is, that Mr. Leontiev  
3 controls those funds now, the monies that were loaned to  
4 Mr. Leontiev. And I think to have an Order that prevents us  
5 from following the funds from Ambika out would effectively  
6 allow him to succeed in preventing us from finding out where he  
7 stole the money; where he siphoned it off and where it is now.

8 We made allegations in the amended complaint that his  
9 business partner showed us trading records that purported to  
10 be --

11 THE COURT: You are going to be taking his deposition  
12 and maybe other depositions of people with knowledge but  
13 certainly his deposition so you are going to be asking where  
14 the funds went, right?

15 MR. HECKER: We certainly are, but we would like to --

16 THE COURT: At that point he is going to say either to  
17 X or to Y I don't remember. If he says I don't remember, then  
18 of course you will get everything. If he says X or Y then you  
19 will get X or Y. Why would you need, in advance, all of his  
20 trading activities?

21 MR. HECKER: I think the concern we have is that we  
22 will need to continue coming back to the Court after getting  
23 one set of --

24 THE COURT: Well, it will be my pleasure.

25 I just think that -- I have seen this so many times it

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1 is a familiar problem. Naturally you don't know exactly what  
2 position he is going to take on a particular question that  
3 might be well put so you are saying, well, give me the world  
4 now because who knows what position he will take. But, a much  
5 more sensible way of doing it is take his deposition, we will  
6 give you a specific answer. If he doesn't then he does so at  
7 his peril because I will give you everything. If he gives you  
8 a specific answer, then you demand those documents and then you  
9 can apply to the Court if you think there is a need for a  
10 further deposition on that, about that, you can apply for that.  
11 And when it comes to party depositions I suppose the  
12 third-party depositions, I am very open to additional  
13 deposition hours to deal with things have only emerged as a  
14 result of the first deposition.

15 So, I think that's a more efficient way to proceed and  
16 I think that that may well apply to your other dispute, the  
17 first dispute as well.

18 MR. HECKER: Respectfully, on that issue?

19 THE COURT: Yes.

20 MR. HECKER: I disagree.

21 We are alleging a scheme to set up these shell  
22 companies as part of a plan from the outset to siphon off money  
23 from the borrowers and to render them unreachable and I think  
24 we are entitled to discovery on how he set up those companies,  
25 who was involved. We have made allegations that suggests the

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1 same trust companies were involve and the same nominees were  
2 used but I think with are entitled to establish that. If this  
3 case goes to trial, we would want to put that in front of the  
4 jury so they understand what Mr. Leontiev had done to render  
5 insolvent the borrowers of the monies.

6 THE COURT: I only have my notes, I don't have the  
7 document requests in front of me, but I thought you wanted all  
8 documents broadly defined relating to all cloud entities beyond  
9 the named borrowers Ambika and Vennop. So, that's not just  
10 asking for how they were set up and who controls them, it is  
11 asking for everything.

12 MR. HECKER: So, perhaps we could tailor the request.  
13 We have listed the cloud entities in the amended answer and  
14 what we would like, of course, is documents to help us  
15 understand how they were set up, what their purpose was, the  
16 monies that went in and out in their relationship to Ambika and  
17 Mr. Leontiev. I think we are entitled to explore that in  
18 understanding the scheme that we have alleged.

19 THE COURT: I think you are entitled to something in  
20 that area. I don't think you are entitled to everything you  
21 have requested. As part of that same order that I will issue  
22 on Friday I will narrow the request appropriately but I already  
23 have narrowed the other dispute we just talked about for now.  
24 The only trading activities that the plaintiff needs to produce  
25 are the trading activities concerning the borrowed funds but

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1 this is totally without prejudice to the further request that I  
2 indicated you could make after the deposition.

3 MR. HECKER: Thank you, Judge.

4 THE COURT: Now, the final dispute is regarding the  
5 interrogatories. Now, I have to start out with a grammatical  
6 point which this Court is particularly good at. These are very  
7 poorly drafted. Let's look at interrogatory no. 1 which is on  
8 page 4 of the interrogatories and it says: Identify all  
9 persons with knowledge or information concerning the concerning  
10 the facts.

11 That, I think, is fairly described as gibberish.  
12 There are many other examples, I will just give you one other.  
13 In the interrogatory no. 2: Identify all persons with  
14 knowledge or information concerning any communications between  
15 you and any of defendant, Avagumyan or Avalon Automotive Group,  
16 New York Motors Moscow, or any of their employees.

17 First of all, I assume you mean defendants.

18 MR. HECKER: There is only one defendant.

19 THE COURT: Then I don't understand how it could be  
20 any of. You can't have it either way unless you didn't want a  
21 comma after defendant.

22 MR. TAFT: The defendant is defined --

23 THE COURT: The point is -- I am sure you can  
24 straighten out these ambiguities but it is your job in drafting  
25 these interrogatories to use unambiguous language. And,

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1 believe me, there are other examples if you go through it.

2 Now, I am not sure -- this is not the main point  
3 raised by plaintiff but we will get to their point in a  
4 minute -- I'm not sure 33.3(a) permits you to break down, by  
5 category, the persons with knowledge as opposed to simply  
6 saying we want a list of all the persons who have knowledge of  
7 the allegations in the complaint. I have seen it both ways. I  
8 am not aware of any meaningful case law on that but it seems to  
9 me by breaking it down the way you have you create -- you  
10 create a potential for ambush. So, let me ask, for example,  
11 supposing they responded to your interrogatories by saying that  
12 Mr. X has knowledge of categories 1, 2, 5, and 7, and you get  
13 to his deposition and, lo and behold, in his answer to a  
14 question he says something about category 6. I am just picking  
15 those numbers at random. Is it your position that his  
16 testimony you had at deposition would be inadmissible on no. 6  
17 because he was not identified as someone in category 6 but only  
18 in categories 1, 5, 7, and 8 or something like that? That is  
19 just a recipe for, at best, endless litigation before the Court  
20 and, at worst, ambush. So, I am not sure you are entitled to  
21 any of these interrogatories.

22 Now, with respect to the one that they specifically  
23 complain about which is no. 19: Identify the custodian and  
24 location of all documents whether or not in your possession,  
25 custody or control -- so, you are positing omniscience on their

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1 part -- that concern the items specified in interrogatories 1  
2 through 18 and provide a general description of those  
3 documents.

4 Again, I think this is not what is contemplated by  
5 local Rule 33.3(a). The Judges of the Southern District, when  
6 they propounded that rule, were trying to deal with the  
7 practice that was then common and is still common in other less  
8 careful districts of hundreds of interrogatories, all  
9 propounded and requiring a laborious laborer, almost all of  
10 which was simply repetitious of what you would be getting in  
11 depositions and document requests. And the feeling in the  
12 Southern District is basically what you need to know up front  
13 is who are the people that have knowledge of the case and where  
14 are the relevant documents located so that as a practical  
15 matter you can know who you need to depose and you, if you  
16 don't get all the documents you want from your adversary, you  
17 will know what third-party you need to go look to to get those  
18 documents. That was the idea. And this is not, I think,  
19 consistent with that idea.

20 So, is there anything you wanted to say before I  
21 strike the interrogatories in their entirety?

22 MR. HECKER: Your Honor, I think what we would like is  
23 an opportunity to look at them again, reformulate them, and try  
24 to address the issues the Court has raised.

25 THE COURT: That sounds to me like a good idea.

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1           So I will, without prejudice, strike the present  
2           interrogatories but give you a week to propound further  
3           interrogatories.

4           MR. HECKER: Thank you, Judge.

5           THE COURT: Anything else we need to take up today?

6           MR. HECKER: Just one issue on the protective order.

7           We have submitted, as Court requested, a copy of the  
8           protective order that excludes the language that we proposed to  
9           give us an out.

10          THE COURT: Yes, I signed that.

11          MR. HECKER: Okay.

12          THE COURT: And that was without prejudice to raising  
13          that issue. I just didn't think I needed to reach that issue  
14          until it became more ripe, so to speak.

15          MR. HECKER: And I am only anticipating a possibility,  
16          I just want to get some guidance from the Court.

17          THE COURT: Yes.

18          MR. HECKER: If, for example, we were to get from law  
19          enforcement that included a request that we not disclose the  
20          existence of the subpoena, could we come to the Court ex parte  
21          and attempt to get the permission under the protective order  
22          that we would need to get the information without notifying the  
23          other side?

24          That is sort of the concern we have.

25          THE COURT: So, which governmental entities would you

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1 have in mind? If it was a U.S. governmental entity I would  
2 expect them to come me and they could come to me ex parte. I  
3 don't see that I would need to have either of the parties come  
4 to me.

5 If it is a foreign entity, then you could come to me  
6 ex parte or they could come to me ex parte but with some  
7 indication of how I could communicate directly with the foreign  
8 entity because there the party is making the request and they,  
9 after questioning by the Court, I may grant their request or  
10 deny it. But I want to be able to talk to them either  
11 literally if it is a U.S. government entity, or through some  
12 communication in writing if it is a foreign entity.

13 MR. HECKER: Okay. Understood, Judge.

14 THE COURT: Very good.

15 Anything else? Very good. Thanks so much.

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